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June 6, 2006

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: Investigation into Retail Billing and Termination Practices for
Telecommunications Carriers
D.T.E. 06-8

Dear Ms. Cottrell:

Enclosed please find an original and five (5) copies of the Initial Comments of the CMRS Providers (Cingular Wireless, Sprint-Nextel, T-Mobile and Verizon Wireless).

Very truly yours,

Robert L. Dewees, Jr.

RLD/tlm

cc: Mark J. Ashby

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department
of Telecommunications and Energy on its own motion
to Establish Retail Billing and Termination Practices for
Telecommunications Carriers

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D.T.E. 06-8

INITIAL COMMENTS OF THE CMRS PROVIDERS

Cingular Wireless, Sprint-Nextel, T-Mobile, and Verizon Wireless (collectively referred to herein as “CMRS Providers”)¹ respectfully submit these comments in response to the Department of Telecommunications and Energy (Department”) Order dated April 7, 2006 (“Order”). In the Order, the Department opened a Notice of Inquiry (“NOI”) to review and consider amending consumer protection provisions, specifically certain Retail Billing and Termination rules.² In response to the Department’s Notice of Inquiry, the CMRS Providers will focus their comments specifically on whether the Department should expand the scope of its consumer protection rules to cover CMRS.

I. INTRODUCTION AND SUMMARY

The Department’s 1994 decision to deregulate the CMRS industry clearly benefited wireless consumers in Massachusetts. The policy underlying that decision, to allow competition to flourish rather than impose heavy-handed regulation, unleashed an explosion of mobile

¹ Commercial Mobile Radio Service (“CMRS”) Providers individually operate in Massachusetts pursuant to licenses granted by the Federal Communications Commission (“FCC”) under Title III of the Communications Act of 1934.

² *Order Opening a Notice of Inquiry to Establish Retail Billing and Termination Practices for Telecommunications Carriers*, D.T.E. 06-8 (April 7, 2006), at pg. 4.

wireless services, features and coverage while also spurring cutthroat reductions in prices. The benefits of that historic decision are still being enjoyed by Massachusetts consumers today; and continue to be propelled by the fiercely competitive makeup of the CMRS industry. No other segment of the telecommunications industry surpasses the CMRS industry in the pursuit of customer satisfaction. The carrier-by-carrier pursuit of customer satisfaction coupled with existing state and federal consumer protection laws, FCC oversight and industry self-policing, provide an effective framework for wireless consumer protection. Moreover, this framework will continue to empower CMRS providers to compete for Massachusetts customers with superior service, differentiated prices and cutting edge mobile wireless technology. CMRS Providers respectfully suggest that the current wireless consumer protection regulatory model in Massachusetts is working very well for residents of the Commonwealth.

In the comments that follow, CMRS Providers will show that the Department's 1994 decision not to regulate CMRS was correct and consistent with Congressional policy. As in 1994, there is simply no need to overlay prescriptive regulations on a market as vibrantly competitive as the CMRS marketplace of 2006. Second, CMRS Providers will demonstrate how the Department's concern over the adequacy of basic consumer protections in a competitive CMRS market is unfounded. Massachusetts wireless consumers benefit from a plethora of state and federal consumer protection laws, as well as, a CMRS industry code of conduct.

II. ANALYSIS

A. THE DEPARTMENT HAS RECOGNIZED THAT A COMPETITIVE WIRELESS MARKET PROTECTS WIRELESS CONSUMERS

In 1994, the Department opened an investigation, on its own motion, into the

CMRS industry: (1) to determine whether to petition the FCC for authority to continue rate regulation of CMRS providers² and (2) to seek comments on the regulation of terms and conditions of CMRS services in Massachusetts.³ After careful consideration, the Department declined to petition the FCC for rate authority and declined to regulate the terms and conditions of CMRS.⁴ Citing the increase in wireless competitors and corresponding reduction in rates as indication of the competitive nature of the CMRS marketplace,⁵ the Department stated: “Based on comments received in this docket, the Department finds that the wireless market in Massachusetts remains competitive...market forces in the state are adequate to protect the public...”⁶ The Department specifically concluded that since market forces were adequate to protect consumers it was unnecessary for it to regulate other terms and conditions of CMRS service, despite a reservation of such authority to the states.⁷ In declining to regulate CMRS services in this manner, the Department relied heavily on the existence of competitive market forces to protect the public.⁸

The CMRS market is more robustly competitive today than it was in 1994. In the First Annual CMRS Competition Report published by the FCC in 1995, which covered the previous year, the FCC noted that the cellular business was more competitive than many telecommunications markets had traditionally been and, produced sufficient competition for the

² To succeed on the merits of a petition to the FCC to retain authority over CMRS rates, the Department would have needed to demonstrate that: (1) market forces in the state are inadequate to protect the public from unjust and unreasonable wireless service rates or from rates that are unjustly or unreasonably discriminatory; or (2) such market conditions exist and such service is a [substantial] replacement for landline telephone exchange service within such state. See *Investigation by the Department of Public Utilities upon its own motion on Regulation of Commercial Mobile Radio Services*, D.P.U. 94-73 at 12 (1994) citing 47 U.S.C. §332(c)(3)(A).

³ *Id* at 1-2.

⁴ *Id* at 14. The Department also determined that wireless service was not a replacement for landline telephone exchange service.

⁵ Moreover, the Department had previously determined a full decade earlier in 1984 that the wireless market in Massachusetts was competitive. *Id* at 13, (citing, *Cellular Resellers*, D.P.U. 84-250, at 6 (1984)).

⁶ *Id* at 13.

⁷ *Id* at 14.

⁸ *Id*.

FCC to deny seven states the authority to continue rate regulation.⁹ The Commission noted that prices were falling¹⁰ and that the advent of broadband PCS was predicted to become a major source of new competition.¹¹

That day has arrived. Competition among CMRS providers continues to deliver substantial benefits to consumers in the form of low prices, family share plans, big buckets of minutes for both voice and data, and innovative new products and services.¹² In addition, dozens of value-added services and features are available to consumers at reasonable prices that allow mass-market consumption. This success is due to fierce competition and the ability to focus finite company resources on network quality, service reliability and effective customer service.

The FCC's 10th Annual CMRS Competition Report released in 2005 vindicates the Department's decision to allow the competitive CMRS marketplace to operate without burdensome state regulation.¹³ The 10th Annual CMRS Competition Report outlines both price rivalry and non-price rivalry in the industry.¹⁴ It describes a maturing CMRS competitive landscape that continues to offer significant incentives to competitors to behave in consumer-friendly ways in order to prevent or reduce churn and allows consumers to "vote with their feet" if a particular carrier's prices or consumer practices are repugnant. In particular, the FCC stated that non-price rivalry such as advertising and marketing, capital expenditures, technology and

⁹ Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, FCC 95-317, 10 FCC Rcd. 8844, ¶ 68, August 18, 1995.

¹⁰ *Id.*, ¶ 74.

¹¹ *Id.*, ¶ 66.

¹² Handsets have become multi-media devices equipped with cameras, music, video, email and internet access.

¹³ Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, FCC 05-173, WT Docket No. 05-71, September 30 2005 ("10th Annual CMRS Competition Report").

¹⁴ *Id.* at, ¶ 97-144.

upgrades, and the provision of ancillary services is a “response to consumer preferences and demand.”¹⁵

B. DEPARTMENT POLICY IS CONSISTENT WITH THE PROCOMPETITIVE CONGRESSIONAL POLICY FOR COMMERCIAL MOBILE RADIO SERVICE

The Department’s current regulatory paradigm toward CMRS, one which allows the fiercely competitive wireless marketplace and existing law to provide essential consumer protections, has benefited consumers in the Commonwealth of Massachusetts and is consistent with the pro-competitive policy adopted by Congress.

Until 1993, wireless communications common carrier services were subject to the same system of dual state and federal common carrier regulation that applied to traditional wireline telephone services under the federal Communications Act of 1934 (“Communications Act”). In the Omnibus Budget Reconciliation Act of 1993 (the “Budget Act”),¹⁶ Congress amended the Communications Act to “dramatically revise the regulation of the wireless telecommunications industry,”¹⁷ thereby establishing a uniform “national regulatory policy for CMRS, not a policy that is balkanized state-by-state”.¹⁸ Those amendments included Section 332(c)(3)(A), which provides:

.... no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services...

¹⁵ Id at ¶ 105. See also, News Release, *FCC Adopts Annual Report on State of Competition in the Wireless Industry*, p. 2, September 30, 2005.

¹⁶ Omnibus Budget Reconciliation Act of 1993, Pub.L.No. 103-66, 107 Stat. 312, 387-97 (1993).

¹⁷ *Cellnet Communications, Inc. v. FCC*, 149 F.3d 429, 433 (6th Cir. 1998).

¹⁸ *In the Matter of Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates Of Wholesale Cellular Service Providers in the State of Connecticut*, 10 FCC Rcd. 7025, 7034 ¶14 (FCC rel. May 19, 1995).

Both the FCC and the courts have emphasized that 47 U.S.C. §332 is not merely a jurisdictional divider for federal and state regulation of CMRS.¹⁹ Rather, Section 332 reflects Congress's intent to create a deregulated, competitive, market-driven environment and, to that end, to preempt states from regulating a broad range of activities connected with CMRS that would interfere with that policy. This model is essentially the same one which has benefited and will continue to benefit consumers in the Commonwealth of Massachusetts.

Despite the state reservation of authority over the "terms and conditions" of CMRS service under § 332, an overwhelming majority of states have recognized the congressional intent to establish a national competitive and deregulated marketplace for wireless service, and as such, do not exercise this jurisdiction. As of this date, thirty-one (31) states plus the District of Columbia have adopted legislation exempting wireless carriers from the jurisdiction of state utility commissions.²⁰ In four (4) additional states, including Massachusetts, the state utility

¹⁹ In fact, states do not have exclusive jurisdiction over the other terms and conditions of CMRS, such that state terms and conditions regulations may still be preempted under federal law.

²⁰ See Ala. Code § 40-21-120(2); Ar. Act 77 of 1997, § 11(g); Colo. Rev. Stat. § 40-15-401(1); 26 Del. Code §§ 102(2), 202(c); D.C. Code § 34-2006(b); Fla. Stat. § 364.02(12); Id. Code §§ 61-121(1), 56-901(1); Kan. Stat. §§ 66-1, 143, -1, 145; KY Act 109 of 2005; Me. Rev. Stat. 13-A § 102.13; Md. Code, Public Utility Companies, § 1-101; Mi. Stat. § 484.2401; Minn. Stat. § 237.01; Mo. Stat. § 386.020(53)(c); Mt. Code Ann. §§ 69-3-803(6)(b), 69-3-842(2), 69-3-844(1); Neb. Rev. Stat. § 86-808(2); N.H. Rev. Stat. § 362:6; Order Approving Interconnection Agreement, *In re Bell Atlantic-New Jersey, Inc. for Approval of an Interconnection Agreement with Nextel Communications of the Mid-Atlantic, Inc. and Smart SMR of New York, Inc.*, Docket No. TO97100760 (N.J. Bd of Public Utilities dated Aug. 19, 1999 ("the Board does not regulate cellular carriers"); see also *New York SMSA Limited Partnership v. East Hanover Township*, 13 N.J. Tax 564, 571 (N.J. Tax Ct. 1994) (holding that cellular mobile telephone service providers are not subject to public utility regulation in New Jersey); N.Y. Pub. Serv. § 5(6)(a); N.C. Gen. Stats. § 62-3(j); Okla. Stat. § 165:59-1-4 (defining "regulated telecommunications service" to exclude wireless telephone service); Or. Rev. Stat. § 759.005(2)(g)(A); 66 Pa. Consol. Stats. § 102-2(iv); S.C. Act. 40 of 2005; Tenn. Code § 65-4-101(6)(F); Tex. Util. Code § 51.003(5); Utah Code § 54-2-1(23)(b); Rev. Code Wash. § 80.66.010(1); Wis. Stat. § 196.01(5)(b)(4). In Virginia, Title 56, Ch. 16 and 16.1 of the Va. Code, which previously provided for the regulation of radio common carriers and CMRS providers, respectively, were repealed in 1995.

commission has statutory authority to deregulate carriers, and has deregulated CMRS through the rulemaking process or by order.²¹

In fact, even in the states where state commissions have statutory jurisdiction over CMRS providers and/or services, many states have chosen to limit such jurisdiction. In 2005, three (3) states enacted statutes removing wireless service from the jurisdiction of their respective state utility commissions.²² In the past two years, the utility commissions of two other states have exempted CMRS from most regulations addressing the terms and conditions of telecommunications services.²³ California has also recently adopted a regulatory approach avoiding the harms of overly detailed and burdensome rules.²⁴ Only one state, New Mexico, has recently adopted detailed consumer protection regulations.²⁵ However, the New Mexico rules are currently being reviewed pursuant to carriers' requests for variances from a number of the more burdensome provisions. They are also the subject of litigation. Additionally, New York is conducting a review within the context of emerging technologies.²⁶

²¹ See Decision & Order No. 20890, Docket No. 03-0186 (Haw. PUC dated April 7, 2004); IA Code § 476.1D(1) (excluding Utilities Board's jurisdiction over communications services or services that are subject to "effective competition", but not specifically statutorily excluding CMRS); 220 Ill. Comp. Stats. § 5/13-203, 83 Ill. Admin Code § 760.10; *In re Proposed Rulemaking to Adopt Regulations Providing for the Registration of Commercial Mobile Radio Service or Cellular Service Providers*, Docket No. 97-9021 (Nev. PUC dated Apr. 30, 1998); *See Investigation by the Department of Public Utilities upon its own motion on Regulation of Commercial Mobile Radio Services, MA* D.P.U. 94-73 (1994).

²² See Kent. Act 109 of 2005; Ind. Sen. Enrolled Act 67 of 2005; and SC Code § 58-11-100 of 2005.

²³ See Decision & Order No. 20890, Docket No. 03-0186 (Haw. PUC dated April 7, 2004); and *See* Decision and Order Docket No. R-28454 (LA PSC dated November 28, 2005).

²⁴ On March 2, 2006, the California Public Utilities Commission (CPUC) approved a new telecommunications "Bill of Rights" that institutes a commission based consumer education and outreach program in collaboration with telecommunications services providers rather than imposing burdensome regulatory requirements that likely would have resulted in unintended consequences for the consumer, such as increased prices and fewer choices than a competitive marketplace affords.

²⁵ 17.11.16 N.M.A.C.-Rp.17.11.16.1 NMAC, 2-1-06.

²⁶ Case 05-C-0616, *Examination of Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (issues April 11, 2006); and subsequent New York Department of Public Service *Consumer Telephone Notice* (May 23, 2006.)

C. EXISTING STATE LAW PROTECTS MASSACHUSETTS WIRELESS CONSUMERS

It is important to recognize that even in the states that have explicitly exempted CMRS from the state utility commission's jurisdiction, customers continue to be protected because the "terms and conditions" of CMRS are subject to the requirements of those states' contract, tort, or consumer protection statutes of general application. Virtually all states have enacted general consumer protection statutes, including Massachusetts, which are typically enforceable by the attorney general of the state.²⁷ The Massachusetts Attorney General has been vigilant in seeking to enforce these laws in the wireless marketplace.²⁸

Additionally, the FCC has adopted comprehensive regulations governing wireless service including truth in billing requirements;²⁹ customer privacy network information rules;³⁰ coverage and build-out requirements;³¹ and 911 and E-911 service,³² to name a few. This is by no means

²⁷ See, e.g., Alabama Deceptive Trade Practices Act, Alabama Code 1975 § 8-19-1, *et seq.*; Arkansas Code Ann. § 4-88-101 *et seq.*; Colorado Consumer Protection Act, § 6-1-101, *et seq.*, C.R.S. (2003); Delaware; Georgia Fair Business Practices Act of 1975, O.C.G.A. 10-1-390, *et seq.*; Hawaii Rev. Stat. § 480-2 and § 487-5(6); Idaho Code § 48-601 *et seq.*; Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS § 505/1 *et seq.*; Illinois Uniform Deceptive Trade Practices Act, § 815 ILCS 510/1, *et seq.*; Iowa Consumer Fraud Act, Iowa Code § 714.16; Kansas Consumer Protection Act, K.S.A. 50-623 *et seq.*; Maine Unfair Trade Practices Act, 5 M.R.S.A. § 205-A *et seq.*; Maryland Consumer Protection Act, Maryland Commercial Law Code Annotated § 13-101 *et seq.*; Massachusetts Consumer Protection Act M.G.L. c. 93A §§ 1-11; Michigan Consumer Protection Act, M.C.L. 445.901 *et seq.*, M.S.A. 19.418 (1) *et seq.* (1994); Montana MCA 30-14-101 *et seq.*; Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601 *et seq.* and the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. §§ 87-301 *et seq.* (1994); Nevada Deceptive Trade Practices Act, Nevada Revised Statutes 598.0903 to 598.0999; New Hampshire Rev. Stat. Ann. 358-A; New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*; New Mexico Unfair Trade Practices Act, NMSA § 57-12-1 *et seq.*, (1978); North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1.1, *et seq.*; North Dakota Century Code §§ 51-15-01, *et seq.*; Ohio Consumer Sales Practices Act, R.C. § 1345.01 *et seq.*; Oklahoma Consumer Protection Act 15 O.S. §§ 751 *et seq.*; Oregon Unlawful Trade Practices Act, ORS 646.605 *et seq.*; South Dakota Deceptive Trade Practices Act, SDCL Ch. 37-24; Tennessee Consumer Protection Act, Tenn. Code Ann. § 47-18-101 *et seq.*; Texas Deceptive Trade Practices and Consumer Protection Act, Tex. Bus. and Com. Code § 17.41 *et seq.*, (West 1993); Vermont Consumer Fraud Act, 9 V.S.A. § 2451 *et seq.*; The Virginia Consumer Protection Act, Va. Code Section 59.1-196 *et seq.*; Wisconsin Statutes §§ 100.18(1) and 100.207; and Wyoming Consumer Protection Act, Wyo. Stat. Ann. §§ 40-12-101 *et seq.* (2003).

²⁸ The Attorneys General of 33 states, including Massachusetts, entered into an Assurance of Voluntary Compliance (AVC), with three national wireless providers regarding certain practices to ensure carriers do not violate state consumer protection and trade practice statutes.

²⁹ 47 C.F.R. § 64.2400.

³⁰ 47 C.F.R. § 64.2001.

³¹ See 47 C.F.R. §§ 22.946-.947; 22.951; 24.103; 24.203.

³² See 47 C.F.R. § 20.18.

an exhaustive list of areas in which the FCC has established regulatory standards for CMRS, but simply illustrates the point that the FCC regulates CMRS broadly.

D. THERE IS NO WIRELESS MARKET FAILURE

The fiercely competitive wireless telecommunications marketplace provides consumers with multiple choices among diverse service offerings and at differentiated prices. There is no evidence whatsoever of a market failure. The fact that over 97% of the US population currently lives in an area served by three (3) or more different facilities-based wireless providers (this statistic does not account for the rapidly increasing number of non-facilities based providers offering wireless services in those areas), all of whom compete on price and service offerings, demonstrates the absence of a market failure.³³ The widespread availability of competitive wireless services has also impacted the broader telecommunications marketplace, infusing competition where little existed before.³⁴

The success behind the FCC's deregulatory market-driven approach to the CMRS industry is that carrier offerings are driven by consumer preferences rather than regulation. As noted by the FCC, "consumers continue to pressure carriers to compete on price and other terms and conditions of service by freely switching providers in response to differences in the cost and

³³ 10th Annual CMRS Competition Report at ¶ 41.

³⁴ Nearly 6% of households have chosen to rely on wireless services for all their communications needs. See, *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005) at ¶ 91 (concluding that mobile wireless services should be included within the product market for local services to the extent that customers rely on mobile wireless services as a complete substitute for, rather than complement to, wireline service). Additionally, the 10th Annual CMRS Competition Report found that, although consumers often forego "cutting the cord" completely, more and more consumers are choosing to use wireless service over traditional wireline service. 10th Annual CMRS Competition Report at ¶ 197. The FCC noted that these trends seemed to be connected to the relatively low cost, widespread availability and increased use of wireless service. *Id.* at ¶ 198. While these figures show that wireless substitution is growing, it is still a long way from overtaking wireline service as the dominant means of communication among consumers. And the growth in wireless substitution should not be a signal to the Department to take a more hands-on, regulatory approach to wireless service. As discussed above, regulation is only appropriate where there is market failure, and as the statistics from the FCC's series of CMRS Competition Reports have consistently shown, the wireless industry is vibrantly competitive.

quality of service.”³⁵ These competitive market effects have been accelerated by the advent of local number portability (“LNP”), which allows consumers to switch wireless service providers, without giving up their mobile phone numbers. The competitive market conditions prevalent in the wireless industry, coupled with the availability of LNP and the protections of existing state and federal laws, are sufficient to ensure that CMRS carriers provide services upon reasonable terms and conditions to consumers throughout Massachusetts. There is no need for the Department to step in and apply a legacy regulatory framework appropriate for monopoly market conditions to the dynamically competitive wireless industry.³⁶

E. FIERCE COMPETITION EXISTS IN THE WIRELESS INDUSTRY IN MASSACHUSETTS AND NATIONWIDE

The deregulation of the wireless industry has been an unparalleled success nationally and in Massachusetts. The FCC reported that five wireless carriers operated in the Commonwealth of Massachusetts as of December 2004, its last reporting date.³⁷ These wireless providers include Cingular Wireless, Sprint Nextel, T-Mobile, Verizon Wireless and Unice—all of which provide service in Massachusetts today. In addition to the facilities-based wireless providers, there are numerous resellers, often referred to as MVNOs (Mobile Virtual Network Operators), that offer service to consumers by purchasing airtime at wholesale rates from facilities-based providers and reselling it at retail rates.³⁸

³⁵ 10th Annual CMRS Competition Report at ¶ 4.

³⁶ This same analysis may be applicable to the other telecommunications services to which the NOI contemplates extending the DTE’s current practices, including in-state long distance service, prepaid services and other emerging technologies..

³⁷ 10th Annual CMRS Competition Report at 81, Table 2 (FCC’s Semi-Annual Local Telephone Competition Survey). Note that carriers with fewer than 10,000 subscribers in a state were not required to report for that state, which could result in an under-reporting of the number of wireless carriers serving Massachusetts.

³⁸ *Id.* at ¶ 27.

In December 1999, there were 1,892,014 wireless customers in Massachusetts. As of December 2004, the total wireless customers in Massachusetts stood at 4,042,592.³⁹ By midyear 2005, reported wireless subscribership had risen to 4,313,846 – up 128% from December 1999.⁴⁰ This growth in wireless customers has increased the wireless penetration rate in Massachusetts to greater than 67 percent.⁴¹

The wireless carriers operating in Massachusetts also create high-paying jobs. As of year-end 2004, there were 2,439 wireless employees in the state earning an average annual compensation of \$71,434 per wireless employee, which amounts to a \$174.3 million total annual wireless carrier payroll.⁴² The wireless carriers in the state also generate \$135,548,416 in Massachusetts state and local tax and fee revenues.⁴³

The CMRS marketplace is increasingly national. By year-end 2004, 183 wireless companies were serving 182 million customers nationwide – 60.9% of all Americans – and an increase of 87% from June 2000. By year-end 2005, there were more than 200 million customers nationwide or 67 percent of all Americans. To succeed in this marketplace, CMRS carriers typically operate without regard to state borders and increasingly have come to structure their offerings on a national or regional basis. This structure reflects the FCC's decision to distribute licenses based on large geographic areas, which typically span more than a single state.⁴⁴

³⁹ *Id.*

⁴⁰ *Local Telephone Competition: Status as of June 30, 2005*, FCC Industry Analysis and Technology Division Wireline Competition Bureau, (released April 3, 2006) at Table 14, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264742A1.pdf. See also, *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC 7717 (2000).

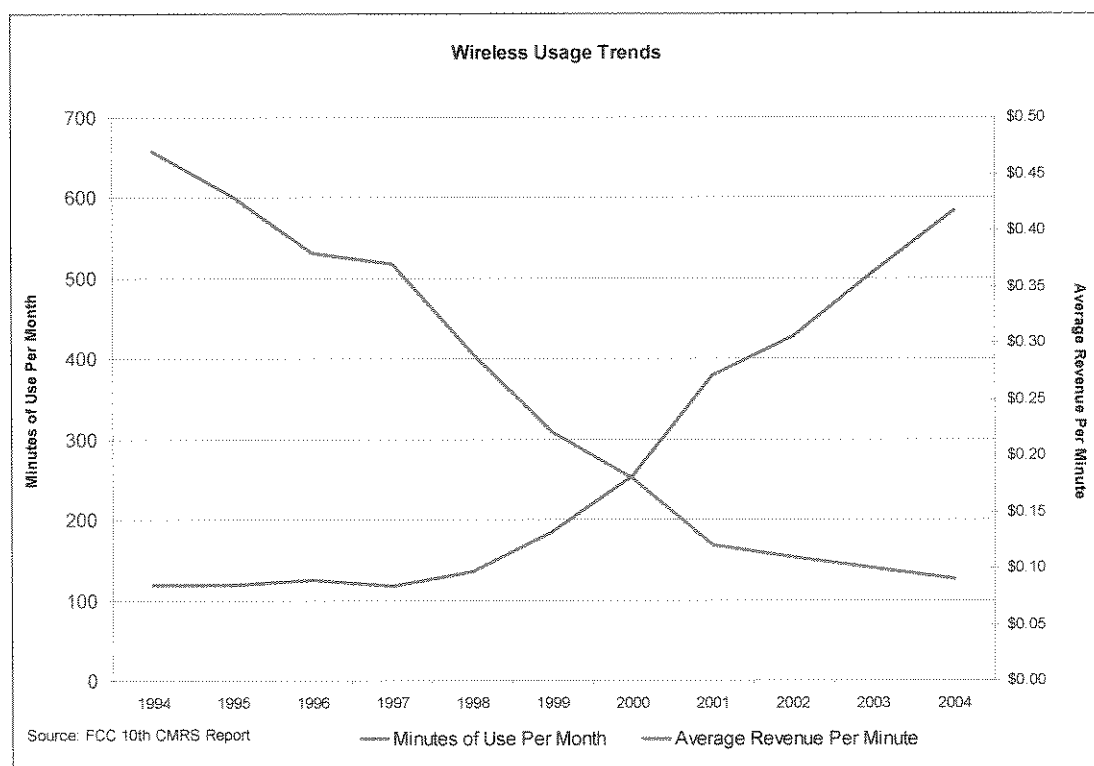
⁴¹ Wireless penetration is not to be confused with wireless substitution. Many wireless subscribers also maintain wireline telephones.

⁴² Bureau of Labor Statistics (as of 2004).

⁴³ Aggregated data from a 2004 industry survey compiled by Scott Mackey, KSE.

⁴⁴ See 47 C.F.R. § 24.202(a), and 51.701(b)(2).

While flat-rate nationwide calling plans were unknown before 1998, today many CMRS operators have responded to competitive pressures by offering some form of national pricing plan that allows wireless customers to purchase a bucket of minutes to use wherever they are, without incurring roaming or long distance charges as well as frequently providing various free nights and weekend options.⁴⁵ Additionally, the average price of service has fallen consistently, from 44 cents per minute in 1993 to 9 cents per minute in 2004.⁴⁶ And in the period from 1997 through 2004, on average wireless prices fell almost 34%, compared to an increase of nearly 18% in general consumer prices.⁴⁷ The following graphic shows the remarkable, year-after-year decrease in consumer cost for wireless services as compared to increased subscriber usage for that same period:



⁴⁵ 10th Annual CMRS Competition Report at ¶ 97.

⁴⁶ *Id.* at 89, Table 8.

⁴⁷ *Id.* at 88, Table 7.

The competitive pressures inherent in the wireless industry have caused wireless carriers to engage extensively in both price and non-price rivalry. Price rivalry has long been evident in the continued rollout of distinct pricing plans that experiment with differing rate levels and structures.⁴⁸ Recently, wireless carriers have attempted to differentiate their services by offering “family plan” packages that give subscribers discounts for adding additional lines.⁴⁹ Wireless carriers have also introduced a variety of new prepaid plans or entirely new brands aimed at specific market groups that have not been traditional purchasers of post-paid wireless services, but tend to gravitate to prepaid wireless services.⁵⁰ The result has been substantial growth in the number of wireless users subscribing to prepaid service plans.⁵¹ Wireless carriers also offer bundled offerings that include several types and combinations of mobile data services.⁵²

Wireless carriers compete aggressively on non-price grounds as well, encompassing such areas as service coverage, including technology deployment and upgrades, quality of service and the offering of ancillary services.⁵³ The deployment of next generation technology to facilitate the offering of mobile broadband services and upgrades made to existing infrastructure continue to be a primary means for wireless carriers to differentiate their products and services and gain advantages over their competitors in the marketplace.⁵⁴ Wireless carriers are increasingly using service quality to distinguish their wireless services in order to attract additional customers and retain existing ones.⁵⁵

⁴⁸ 10th Annual CMRS Competition Report at ¶¶ 97-98.

⁴⁹ *Id.* at ¶ 98.

⁵⁰ *Id.* at ¶¶ 3, 99-100.

⁵¹ *Id.* at ¶ 100.

⁵² *Id.* at ¶ 101.

⁵³ *Id.* at ¶ 105.

⁵⁴ *Id.* at ¶¶ 3, 105-127.

⁵⁵ *Id.* at ¶¶ 132-137.

F. WIRELESS CONSUMER COMPLAINTS ARE ON A DOWNWARD TREND

This vigorously competitive wireless services market has resulted in generally satisfied wireless customers. The FCC recently released its Quarterly Report on Informal Consumer Inquiries and Complaints covering the first quarter of calendar year 2006. The FCC report showed that wireless complaints decreased from 4,956 in the fourth quarter of 2005 to 4,616 in the first quarter of 2006 despite a 14% increase in subscribers over that same period. The number of wireless inquiries the FCC received during the first quarter of 2006 declined to 7,130 from 9,246 received in the fourth quarter of 2005.⁵⁶ Complaints have been on a downward trend over the past year despite the rapid increase in subscribers.

Additionally, the U.S. General Accounting Office wrote in a 2003 report to Congress that approximately 83% of mobile phone users were satisfied with their service.⁵⁷ While carriers aggressively work to reduce and eliminate specific complaints, when consumers are asked about their overall satisfaction with their CMRS provider, they generally report they are satisfied. This data supports the conclusion that new regulation of wireless service is therefore not needed to assure satisfactory service.

G. THE CTIA CONSUMER CODE PROVIDES MASSACHUSETTS CONSUMERS ADDITIONAL BASIC CONSUMER PROTECTIONS IN LINE WITH THE GUIDING PRINCIPLES

⁵⁶ FCC Report on Informal Consumer Inquiries and Complaints, 1st Quarter Calendar Year 2006. The data reported reflect the complaints and inquiries recorded in the Consumer & Governmental Affairs Bureau's (CGB) tracking systems for the period January 1, 2006 to March 31, 2006.

⁵⁷ U.S. General Accounting Office, *Telecommunications, FCC Should Include Call Quality in Its Annual Report on Competition in Mobile Phone Services*, Report to the Honorable Anthony D. Weiner, House of Representatives, GAO-03-501, at 3 (April 2003).

A key tenet in the NOI is the proposition that “customers must receive certain basic consumer protections from their telecommunications providers, even in a competitive market...” CMRS Providers could not agree more. Assuming for the sake of argument that the competitive marketplace alone is inadequate to protect Massachusetts wireless consumers⁵⁸, as explained in detail above, these same citizens would still also enjoy the basic consumer protections afforded to every consumer of general business goods and services in the Commonwealth,⁵⁹ and also those provided nationally by the FCC. Moreover, wireless consumers have specific important additional protections – those instituted by the CMRS industry in a wireless code of conduct.

The CTIA Consumer Code for Wireless Service (“Consumer Code”) was developed by the wireless industry in the summer of 2003.⁶⁰ It was an attempt to identify the basic consumer issues of most concern at that time and to volunteer an industry response. Contrary to some portrayals, there is nothing voluntary about complying with Consumer Code requirements once a wireless company has committed to them. Only wireless carriers committing to and certifying annual compliance with the Consumer Code are entitled to use the CTIA Seal of Wireless Quality in marketing promotions. Wireless companies have reported other wireless carriers to the CTIA for lapses in Consumer Code compliance and these lapses have been timely resolved. For the information of the Department, CMRS Providers in this docket are all CTIA members and are all presently certified to be in compliance with the Consumer Code.

The Consumer Code provides a framework for basic wireless consumer protection. Each certifying carrier has agreed to abide by its provisions and has implemented its ten corresponding

⁵⁸ Included within the competitive market would be third party reviewers such as *Consumer Reports* and rankings such as *J.D. Power and Associates*. Also important are the respective seals of the *Better Business Bureaus* across the country.

⁵⁹ Including additionally those pursuant to the Assurance of Voluntary Compliance (AVC) negotiated between Cingular Wireless, Sprint PCS and Verizon Wireless and the Office of the Massachusetts Attorney General.

⁶⁰ See attached.

requirements, including those to provide clear and accurate disclosure of rates and terms of service in order for consumers to make informed decisions; reasonable notice of any changes to the terms and conditions of service and the customer's consequent right to terminate the subscriber agreement if he/she so chooses; and customer service that is capable of taking into account the special needs of certain wireless customers.

The Department in its NOI proposed that in establishing an updated set of residential billing and termination rules, it would rely on certain guiding principles ("Guiding Principles"). The Department specifically declared:

...that customers must receive certain basic consumer protections from their telecommunications providers, even in a competitive market; that customers must receive accurate information in order to make informed decisions on their own behalf; that customers must have adequate notice of any changes to the terms and conditions of their service; that customers must have adequate time to take action where action is required, and that some classes of customers may require additional time to act; that the Department's mission is not to absolve any party of the consequences of its actions; that carriers and their customers are responsible for the consequences of their actions; and that the Department will resolve disputes between carriers and their retail customers upon request.⁶¹

The Department's proposed Guiding Principles follow closely those same goals that the CMRS industry previously identified and addressed in the Consumer Code. As the Department asserts, even in a competitive market, "...customers must receive accurate information in order to make informed decisions on their own behalf..." Provisions of the Consumer Code directly address appropriate disclosures to ensure consumers have the information they need to make informed choices. Specifically, the Consumer Code calls for carriers to: (1) disclose rates and terms of service at point of sale and on their website, which may include but is not limited to information about the rate plan; any monthly recurring charges; airtime minutes; additional

⁶¹ D.T.E 06-8 at 4-5.

charges for long distance and/or roaming; length of any applicable contract; and information on all fees and charges; (2) disclose material charges and conditions related to any prices advertised for wireless services or devices; and (3) make coverage maps available at point of sale and on carrier websites depicting approximate voice service coverage applicable to each of the rate plans currently offered to consumers.

The Department also suggests as a guiding principle that “customers must have adequate notice of any changes to the terms and conditions of their service.” Under the Consumer Code, when a customer initiates service with a wireless carrier or agrees to a change in service whereby the customer is bound to a contract extension, carriers must provide or confirm the material terms and conditions of service with the subscriber. In addition, carriers may not modify the material terms of subscribers’ contracts in a manner that is materially adverse to subscribers without providing a reasonable advance notice of a proposed modification and allowing subscribers a period of not less than 14 days to cancel their contract with no termination fee.

To ensure that customers “...have adequate time to take action where action is required...”, the Consumer Code sets forth a trial period for new service, in which carriers must inform and provide customers a period of not less than 14 days to try out service and cancel without incurring an early termination fee. Additionally, the Consumer Code requires that carriers provide a toll-free telephone number for customers to access a carrier’s customer service during normal business hours, and respond in writing to state or federal administrative agencies within 30 days of receipt of written consumer complaints from any such agency.


A competitive marketplace motivates a carrier to “one-up” the competition in responding to consumers’ wants and needs, or, in other words, to differentiate its responses from those of its competitors. For a fiercely competitive wireless industry to come together voluntarily to commit

to all ten points of the Consumer Code was a significant undertaking. Not unlike the Department's Guiding Principles, the Consumer Code is an example of how certain basic consumer protections can be enhanced in a manner that still preserves the ability of carriers to focus resources to differentiate and compete on price, customer service, quality of service and features.

III. CONCLUSION

The CMRS Providers appreciate this opportunity to comment, and hereby respectfully request that the Department refrain from applying any existing and/or adopting any new regulations directed toward wireless carriers. Regulations are unnecessary since existing laws as well as current practices of the various wireless carriers – spurred on by a fiercely competitive environment – and reinforced by the Consumer Code, ensure that Massachusetts consumers are appropriately protected while they enjoy the benefits of true competition.

Respectfully submitted:



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CTIA

Consumer Code *for* Wireless Service

To provide consumers with information to help them make informed choices when selecting wireless service, to help ensure that consumers understand their wireless service and rate plans, and to continue to provide wireless service that meets consumers' needs, the CTIA and the wireless carriers that are signatories below have developed the following Consumer Code. The carriers that are signatories to this Code have voluntarily adopted the principles, disclosures, and practices here for wireless service provided to individual consumers.

THE WIRELESS CARRIERS THAT ARE SIGNATORIES TO THIS CODE WILL:

ONE

DISCLOSE RATES AND TERMS OF SERVICE TO CONSUMERS

For each rate plan offered to new consumers, wireless carriers will make available to consumers in collateral or other disclosures at point of sale and on their web sites, at least the following information, as applicable: (a) the calling area for the plan; (b) the monthly access fee or base charge; (c) the number of airtime minutes included in the plan; (d) any nights and weekend minutes included in the plan or other differing charges for different time periods and the time periods when nights and weekend minutes or other charges apply; (e) the charges for excess or additional minutes; (f) per-minute long distance charges or whether long distance is included in other rates; (g) per-minute roaming or off-network charges; (h) whether any additional taxes, fees or surcharges apply; (i) the amount or range of any such fees or surcharges that are collected and retained by the carrier; (j) whether a fixed-term contract is required and its duration; (k) any activation or initiation fee; and (l) any early termination fee that applies and the trial period during which no early termination fee will apply.

TWO

MAKE AVAILABLE MAPS SHOWING WHERE SERVICE IS GENERALLY AVAILABLE

Wireless carriers will make available at point of sale and on their web sites maps depicting approximate voice service coverage applicable to each of their rate plans currently offered to consumers. To enable consumers to make comparisons among carriers, these maps will be generated using generally accepted methodologies and standards to depict the carrier's outdoor coverage. All such maps will contain an appropriate legend concerning limitations and/or variations in wireless coverage and map

usage, including any geographic limitations on the availability of any services included in the rate plan. Wireless carriers will periodically update such maps as necessary to keep them reasonably current. If necessary to show the extent of service coverage available to customers from carriers' roaming partners, carriers will request and incorporate coverage maps from roaming partners that are generated using similar industry-accepted criteria, or if such information is not available, incorporate publicly available information regarding roaming partners' coverage areas.

THREE

PROVIDE CONTRACT TERMS TO CUSTOMERS AND CONFIRM CHANGES IN SERVICE

When a customer initiates service with a wireless carrier or agrees to a change in service whereby the customer is bound to a contract extension, the carrier will provide or confirm the material terms and conditions of service with the subscriber.

FOUR

ALLOW A TRIAL PERIOD FOR NEW SERVICE

When a customer initiates service with a wireless carrier, the customer will be informed of and given a period of not less than 14 days to try out the service. The carrier will not impose an early termination fee if the customer cancels service within this period, provided that the customer complies with applicable return and/or exchange policies. Other charges, including airtime usage, may still apply.

FIVE

PROVIDE SPECIFIC DISCLOSURES IN ADVERTISING

In advertising of prices for wireless service or devices, wireless carriers will disclose material charges and conditions related to the advertised prices, including if applicable and to the extent the advertising medium reasonably allows: (a) activation or initiation fees; (b) monthly access fees or base charges; (c) any required contract term; (d) early termination fees; (e) the terms and conditions related to receiving a product or service for "free;" (f) the times of any peak and off-peak calling periods; (g) whether different or additional charges apply for calls outside of the carrier's network or outside of designated calling areas; (h) for any rate plan advertised as "nationwide," (or using similar terms), the carrier will have available substantiation for this claim; (i) whether prices or benefits apply only for a limited time or promotional period and, if so, any different fees or charges to be paid for the remainder of the contract term; (j) whether any additional taxes, fees or surcharges apply; and (k) the amount or range of any such fees or surcharges collected and retained by the carrier.

SIX

SEPARATELY IDENTIFY CARRIER CHARGES FROM TAXES ON BILLING STATEMENTS

On customers' bills, carriers will distinguish (a) monthly charges for service and features, and other charges collected and retained by the carrier, from (b) taxes, fees and other charges collected by the carrier and remitted to federal state or local governments. Carriers will not label cost recovery fees or charges as taxes.

SEVEN

PROVIDE CUSTOMERS THE RIGHT TO TERMINATE SERVICE FOR CHANGES TO CONTRACT TERMS

Carriers will not modify the material terms of their subscribers' contracts in a manner that is materially adverse to subscribers without providing a reasonable advance notice of a proposed modification and allowing subscribers a time period of not less than 14 days to cancel their contracts with no early termination fee.

EIGHT

PROVIDE READY ACCESS TO CUSTOMER SERVICE

Customers will be provided a toll-free telephone number to access a carrier's customer service during normal business hours. Customer service contact information will be provided to customers online and on billing statements. Each wireless carrier will provide information about how customers can contact the carrier in writing, by toll-free telephone number, via the Internet or otherwise with any inquiries or complaints, and this information will be included, at a minimum, on all billing statements, in written responses to customer inquiries and on carriers' web sites. Each carrier will also make such contact information available, upon request, to any customer calling the carrier's customer service departments.

NINE

PROMPTLY RESPOND TO CONSUMER INQUIRIES AND COMPLAINTS RECEIVED FROM GOVERNMENT AGENCIES

Wireless carriers will respond in writing to state or federal administrative agencies within 30 days of receiving written consumer complaints from any such agency.

TEN

ABIDE BY POLICIES FOR PROTECTION OF CUSTOMER PRIVACY

Each wireless carrier will abide by a policy regarding the privacy of customer information in accordance with applicable federal and state laws, and will make available to the public its privacy policy concerning information collected online.